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Abdul Rahman bin Saleh v Hj Md Fuzi Hj Ahmad Shahim (presiding officer of Election N49 Nusa Jaya) & Ors

HIGH COURT (JOHOR BAHRU) — ELECTION PETITION NO 26PP-2–06 OF 2013
HASNAH HASHIM J
30 AUGUST 2013

Election — Petition — Allegation of act of falsifying — Allegation of breach of election laws relating to procedure in counting votes — Failure to particularise what items or facts falsified — Failure to plead material facts to show cause to complain under provisions of s 32 of the Election Offences Act 1954 — Failure to comply with r 4(1)(b) and 4(4) of the Election Petition Rules 1954

Election — Petition — Defective petition — Failure to plead material facts — Petition to narrate facts complained of — Petition to relate complaints with provisions of election laws transgressed — Failure to plead material facts to show cause to complain under provisions of s 32 of the Election Offences Act 1954

Election Petition — Service — Personal service — Notice of presentation of petition and petition to be served by petitioner or petitioner's advocate — Whether service by agent firm of solicitors amounted to non-compliance — Petition struck out — Election Petition Rules 1954 r 15(1)

This election petition arose from the 13th General Election held on 5 May 2013 ('the said election'). The petitioner was a registered voter for the State Constituency of N49 Nusa Jaya, Johor. The petitioner filed this petition pursuant to s 34(a) of the Election Offences Act 1954 ('the EOA') and sought declarations that the election of the state constituency of N49 was void and that the third respondent was not duly elected or ought not to have been returned. The petitioner claimed that: (a) the presiding officer had falsified Form 14 which is an offence under s 4(a) of the EOA; (b) the presiding officer had breached s 4(g) of the EOA read together with s 3(h) and (i) of the same Act and reg 27B of the Elections (Conduct of Elections) Regulations 1981 ('the ECER') for failing to prevent some persons from taking out four advance ballot papers from the constituency N14 to N29 Mahkota; and (c) due to this, the election was not conducted in accordance with the written law relating to the conduct of election. The respondents raised the following preliminary objections: (i) non-compliance of r 15(1) of the Election Petition Rules 1954 ('the Rules') in respect of the method and manner of service of the election petition; and (ii) non-compliance of the mandatory provisions of r 4(1)(b) and

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r 4(4) of the Rules requiring the petition to state the facts and grounds to sustain the prayers sought. A

Held, striking out the petition with costs of RM25,000 for each respondent:

(1) Rule 15(1) of the Rules clearly provides that the notice of presentation of a petition accompanied with a copy of the petition must be served by none other than the petitioner. However, if the petitioner has appointed an advocate pursuant to r 9 of the EPR then the notice of presentation together with a copy of the petition can be duly served on the respondent by the advocate so appointed. The service of the notice as well as the copy of the petition here was performed by the advocate not on the instruction of the petitioner, himself but on the instruction of another firm of solicitors, Messrs Haida, Mohd Fikah & Partners. This was therefore a non compliance of r 15(1) of the Rules. If the mandatory requirements as provided under r 15 of the Rules is disregarded by the petitioner then the jurisdiction of the election court is not invoked. Therefore premised on this ground alone the election petition was obviously flawed and should be struck out and dismissed (see paras 10–11). B C D

(2) It is incumbent on the petitioner to plead in his election petition that there was non-compliance with the provisions of any written law relating to the conduct of any election and such non-compliance affected the result of the election. The petitioner must not only narrate the facts complained of but must also relate and associate the complaints with the provisions of the election laws transgression (see para 18). E F

(3) The petitioner contended that there were some act of falsifying but however the petition did not particularised what items or facts that was falsified. A petitioner must plead in the petition such material facts with such particulars where necessary to show on the face of the petition that he has a cause to complain under one of the five provisions of s 32 of the EOA. The petitioner failed to state the material facts and grounds with regards to complaints to sustain the prayers sought (see paras 24 & 29). G

(4) There was no material facts pleaded in the petition to show that that there was a breach of the law relating to the procedure in the counting of votes. The petition did not disclose sufficient facts to show that there was a breach of the election laws relating to the procedure in the counting of the votes. The petitioner therefore had not complied with the requirement of r 4(1)(b) and 4(4) of the Rules. The petition lacked the particulars which entitled the petition to be struck out (see paras 36–37). H I

(5) The petitioner had failed to comply with the requirements of the EPR as the facts and the grounds pleaded did not support the relief sought. The preliminary objections raised by the respondent's relating to r 4(1)(b) and

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4(4) of the Rules read together with s 32(b) of the EOA were sufficient to strike out the petition (see para 45).

[Bahasa Malaysia summary

Petisyen pilihan raya timbul daripada Pilihan Raya Am ke-13 yang diadakan pada 5 Mei 2013 ('pilihan raya tersebut'). Pempetisyen merupakan pengundi berdaftar untuk Kawasan Negeri N49 Nusa Jaya, Johor. Pempetisyen telah memfailkan petisyen ini menurut s 34(a) Akta Kesalahan Pilihan Raya 1954 ('AKP') dan memohon deklarasi-deklarasi bahawa pilihan raya Kawasan Negeri N49 adalah tidak sah dan bahawa responden ketiga tidak dipilih atau tidak seharusnya dipulangkan. Pempetisyen mendakwa bahawa: (a) ketua tempat mengundi telah memalsukan Borang 14 yang mana merupakan kesalahan di bawah s 4(a) AKP; (b) ketua tempat mengundi telah bercanggah dengan s 4(g) AKP dibaca bersama s 3(h) dan (i) Akta yang sama dan peraturan 27B Peraturan-Peraturan Pilihan Raya (Penjalanan Pilihan Raya) 1981 ('ECER') kerana gagal untuk menghalang beberapa orang daripada mengeluarkan empat kertas pendahuluan undi daripada kawasan N14 sehingga N29 Mahkota; dan (c) oleh kerana ini, pilihan raya tidak dijalankan mengikut undang-undang bertulis berkenaan dengan tingkah laku pilihan raya. Responden-responden membangkitkan bantahan awalan berikut: (i) ketidakpatuhan kaedah 15(1) Kaedah-Kaedah Petisyen Pilihan Raya 1954 ('Kaedah-Kaedah') berkenaan dengan kaedah dan cara penyampaian petisyen pilihan raya; dan (ii) ketidakpatuhan peruntukan mandatori kaedah 4(1)(b) dan 4(4) Kaedah-Kaedah memerlukan petisyen untuk menyatakan fakta-fakta dan alasan untuk mempertahankan permohonan yang dituntut.

Diputuskan, membatalkan petisyen dengan kos sebanyak RM25,000 untuk setiap responden:

(1) Kaedah 15(1) Kaedah-Kaedah jelas memperuntukkan bahawa notis penyerahan petisyen bersama salinan petisyen hendaklah diserahkan oleh tidak selain daripada pempetisyen. Walau bagaimanapun, sekiranya pempetisyen telah melantik peguam menurut kaedah 9 Kaedah-Kaedah oleh itu notis penyerahan bersama dengan salinan petisyen boleh disampaikan kepada responden oleh peguam yang dilantik. Penyampaian notis dan juga salinan petisyen di sini telah dilakukan oleh peguam bukan atas arahan pempetisyen, tetapi atas arahan firma guaman yang lain, Tetuan Haida, Mohd Fikah & Partners. Oleh itu, ia tidak mematuhi kaedah 15(1) Kaedah-Kaedah. Sekiranya keperluan mandatori seperti yang diperuntukkan di bawah kaedah 15 PPR diendahkan oleh pempetisyen oleh, itu bidang kuasa mahkamah pilihan raya tidak boleh digunakan. Justeru berpandukan alasan ini sahaja petisyen pilihan raya dengan jelas adalah cacat dan seharusnya dibatalkan dan diketepikan (lihat perenggan 10–11).

(2) Adalah penting bagi pempetisyen untuk memplid petisyen pilihan

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rayanya bahawa terdapat ketidakpatuhan peruntukan mana-mana undang-undang bertulis berkenaan dengan tindakan sebarang pilihan raya dan ketidakpatuhan tersebut memberi kesan kepada keputusan pilihan raya. Pempetisyen bukan sahaja perlu menceritakan fakta-fakta yang diadukan tetapi juga hendaklah mengaitkan aduan dengan peruntukan pilihan raya undang-undang pilihan raya yang dicanggah (lihat perenggan 18).

(3) Pempetisyen berhujah bahawa terdapat tindakan pemalsuan tetapi petisyen tidak memberi butiran item atau fakta yang mana yang telah dipalsukan. Pempetisyen hendaklah memplid di dalam petisyen fakta-fakta material dengan butiran mana yang perlu untuk menunjukkan secara nyata pada petisyen bahawa dia mempunyai kausa untuk membuat aduan di bawah salah satu daripada lima peruntukan s 32 AKP. Pempetisyen gagal untuk menyatakan fakta dan alasan material berkenaan dengan aduan-aduan untuk mempertahankan permohonan yang dipohon (lihat perenggan 24 & 29).

(4) Tidak terdapat fakta material yang diplid di dalam petisyen untuk menunjukkan bahawa terdapat percanggahan undang-undang berkenaan dengan prosedur mengira undi. Petisyen tidak menyatakan fakta yang mencukupi untuk menunjukkan terdapat percanggahan undang-undang pilihan raya berkenaan dengan prosedur dalam mengira undi. Pempetisyen oleh itu tidak mematuhi keperluan kaedah 4(1)(b) dan 4(4) Kaedah-Kaedah. Petisyen kekurangan butiran yang mana menyebabkan petisyen dibatalkan (lihat perenggan 36–37).

(5) Pempetisyen telah gagal untuk mematuhi keperluan EPR memandangkan fakta-fakta dan alasan yang diplid tidak menyokong relief yang dipohon. Bantahan awal yang dibangkitkan oleh responden berkenaan dengan kaedah 4(1)(b) dan 4(4) Kaedah-Kaedah dibaca dengan s 32(b) AKP adalah mencukupi untuk membatalkan petisyen (lihat perenggan 45).]

Notes

For cases on defective petition, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2180–2187.

Cases referred to

Bong Geok Beng v Ahmad Nordin bin Mohamed Amin & Anor; Rosnah bt Kamarudin v Samad bin Kassim & Anor; Lai Keun Ban v Tan Sri Chong Hon Nyen & Anor; Mohamed bin Bakar v Abdul Rashid bin Othman & Anor [1980] 1 MLJ 167; [1978] 1 LNS 18 (refd)

Dato' Ismail bin Kamus v Pegawai Pengurus Pilihan Raya, Zainal Abidin Azim & Ors [2005] 3 MLJ 193; [2005] 2 CLJ 237, FC (refd)

Gan Joon Zin v Fong Kui Lun & Ors [2004] 4 CLJ 729, FC (refd)

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Hardwari Lal v Kanwal Singh AIR 1972 SC 515, SC (refd)
Mahari bin Endut v Dato' Hj Mat Razali Kassim & Ors [2009] 5 MLJ 153; [2009] 4 CLJ 488; [2009] 1 LNS 449, FC (refd)
Mohd Nazri bin Hj Din v Dato' Seri Raja Ahmad bin Zainuddin Raja Haji Omar & Ors [2009] 3 MLJ 589; [2009] 1 LNS 129, FC (refd)
Mohd Zaid bin Ibrahim v P Kamalanathan a/l P Panchanathan & Ors [2010] 6 MLJ 363; [2010] 8 CLJ 608, HC (refd)
Muhammad Sanusi Md Nor v Mohd Tajuddin Abdullah & Yang Lain [2009] 1 CLJ 1, FC (refd)
Patau Rubis v Patrick Uren & Anor [1984] 1 CLJ 51; [1984] 2 CLJ (Rep) 348, HC (refd)
Tan Sri Joseph Kurup v Danny Anthony Andipai & Anor [2009] 3 MLJ 1; [2009] 3 CLJ 523, FC (refd)
Tengku Korish v Muhamad bin Jusoh; Abdul Raouf v Ibrahim bin Arshad & Anor; Mokhtar bin Abdullah v Mokhtar bin Haji Daud & Anor [1970] 1 MLJ 6; [1969] 1 LNS 189 (refd)
Wan Daud bin Wan Jusoh v Mohamed bin Haji Ali & Anor; Daud bin Jusoh v Annuar bin Haji Musa & Anor; Mohd Nor bin Ismail v Mohd Zain bin Abdullah & Anor [1988] 2 MLJ 384; [1987] 1 LNS 68 (refd)
Wan Sagar bin Wan Embong v Harun bin Taib [2008] 6 MLJ 473; [2009] 1 CLJ 457, FC (refd)

Legislation referred to

Elections (Conduct of Elections) Regulations 1981 regs 25, 27B
Elections Act 1958 ss 15, 16
Election Offences Act 1954 ss 2, 2(1), 3(h), (i), 4, 4(a), (g), 6, 32, 32(b), 34(a), 36, 36(1), 41, 42(1), Form 14
Election Petition Rules 1954 rr 4(1)(b), 4(4), 5, 9, 15, 15(1)

Nasar Khan Mirbas Khan (Mohd Fikah Sanusi, Zulqarnain Lukman and Mohd Zambri with him) (Haida Mohd Fikah & Partners) for the petitioner.
Syed Faisal Syed Abdullah (Mohamad Reza Abu Hassan with him) (Syed Faisal & Co) for the first fespondent.
Fajrul Shihar Abu Samah (Nik Azrin Zairin Nik Abdullah, Nurul Ainy Yahaya, Munahyza Mustafa and Asliza Ali with him) (Attorney General's Chambers) for the second and third respondents.

Hasnah Hashim J:

THE ELECTION PETITION

[1] This election petition arises from the 13th General Election held on 5 May 2013 ('the said election'). The petitioner, Abdul Rahman bin Saleh, is a registered voter in the general elections held on 5 May 2013 for the State

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Constituency of N49 Nusa Jaya, Johor. In the said election the third respondent, Dr Zaini bin Abu Bakar, was declared to be duly elected with a majority vote of 2,201 votes.

[2] The petitioner filed the petition pursuant to s 34(a) of the Election Offences Act 1954 ('the EOA') and sought the following prayers:

(a) a declaration that the election of the State Constituency of N49 Nusa Jaya, Johor held on 5 May 2013 is void;

(b) a declaration that the third respondent, Dr Zaini bin Abu Bakar, was not duly elected or ought not to have been returned;

(c) determination and directions pursuant to s 36 of the EOA;

(d) costs; and

(e) any other further order or other reliefs as the court deems just.

THE GROUNDS

(a) The presiding officer had falsified Form 14 which is an offence under s 4(a) of EOA;

(b) the presiding oficer had breached s 4(g) EOA read together with s 3(h) and (i) of the same Act and reg 27B of the Elections (Conduct of Elections) Regulations 1981 ('ECER') for failing to prevent some persons from taking out four advance ballot papers from the Constituency N14 Nusa Jaya to N29 Mahkota; and

(c) the aforesaid acts of the presiding officers caused the election not to have been conducted in accordance with any written law relating to the conduct of any election. The non-compliance had affected the result of the election under s 32(b) of the EOA.

THE PRELIMINARY OBJECTIONS

[3] The first, second and third respondents raised the following preliminary objections:

(a) the non-compliance of r 15(1) of the Election Petition Rules 1954 ('the EPR') in respect of the method and manner of service of the election petition;

(b) the non-compliance of the mandatory provisions of r 4(1)(b) and 4(4) of the EPR requiring the petition to state the facts and grounds to sustain the prayers sought read together with s 32(b) of the EOA as the facts and the grounds do not support the relief sought; and

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(c) the petitioner failed to comply with the mandatory provisions of r 4(1)(b) of the EPR read together with s 32(b) of the EOA. The facts pleaded are insufficient to sustain the prayer that the alleged non-compliance have affected the result of the election.

THE LAW

[4] The procedures and conduct of election as well as election petition are mainly governed by the following statutes:

(a) the Election Offences Act 1954 (EOA);

(b) the Election Petition Rules 1954 (EPR). This Rules is made pursuant to s 42(1) of the EOA;

(c) Elections Act 1958;

(d) the Elections (Conduct of Elections) Regulations 1981 (ECER). This Regulations is made pursuant to s 16 of the Elections Act 1958;

(e) Elections (Postal Voting) Regulations 2003. This Regulations is made pursuant to s 16 of the said Elections Act; and

(f) Elections (Registration of Electors) Regulations 2002. This Regulations is made pursuant to s 15 of the said Election Act.

[5] Justice Azahar Mohamed J, (as he then was) in *Mohd Zaid bin Ibrahim v P Kamalanathan a/l P Panchanathan & Ors* [2010] 6 MLJ 363; [2010] 8 CLJ 608; at p 619 said:

> The first thing that one should know and clearly understand is that the jurisdiction of the election judge to hear election petition is a creature of statute and the judge is especially bound strictly within the letters of the election laws (see: *Mahari Endut v Dato' Hj Mat Razali Kassim, Pegawai Pengurus Pilihan Raya Bagi Kawasan Dewan Undangan Negeri N15 Ladang & Ors* [2009] 5 MLJ 153; [2009] 4 CLJ 488; [2009] 1 LNS 449). In the same vein, just as the election court is bound by the election laws, so too the petitioner in any election petition must strictly adhered to and obeyed all the requirements of the election laws. And in this regard, even in the area of Public Law litigation, the *audi alteram partem rule*, or the rule requiring fair hearing is of central importance. A basic norm of natural justice is that before initiating adjudicatory proceedings, the party concerned should be given notice of the case against him so as to enable him to adequately defend himself. The right to a hearing becomes illusory if the party has no sufficient and full knowledge of the precise allegations which he has to meet. Notice is thus regarded as the sine qua non of the right of hearing (see *Administrative Law of Malaysia and Singapore* (3rd) Ed by Professor MP Jain at p 291).

[6] In *Muhammad Sanusi Md Nor v Mohd Tajuddin Abdullah & Yang Lain* [2009] 1 CLJ 1 the Federal Court held:

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Adalah menjadi prinsip mantap bahawa mana-mana petisyen yang tidak mengikuti atau menepati kehendak mandatori mana-mana undang-undang pilihan raya dianggap cacat dan batal (sila lihat *Devan Nair v Yong Kuan Teik* [1967] 1 LNS 37; *Chong Thain Vun v Watson & Anor* [1968] 1 MLJ 261 dan *Patau Rubis v Patrick Uren & Anor* [1984] 1 CLJ 51; [1984] 2 CLJ (Rep) 348). Adalah perlu bagi kami menyatakan di sini bahawa kehendak statutori sesuatu petisyen hendaklah dipatuhi dengan ketat dan sepenuhnya kerana pertikaian pilihan raya adalah suatu prosiding statutori yang khas serta khusus dan asing kepada undang-undang common law atau ekuiti.

[7] An election can only be avoided on an election petition based on the grounds as specified under s 32 of the EOA:

The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:

(a) that general bribery, general treating or general intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;

(b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;

(c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;

(d) that the candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement been convicted or found guilty of a corrupt practice by a Sessions Court, or by the report of an Election Judge; or

(e) that the candidate was at the time of his election a person disqualified for election.

The non-compliance of r 15(1) of the EPR

[8] It is the submission of the first respondent that the person who performed the service was not the petitioner as required by r 15 of the EPR. According to the affidavit of service (encl 9) the petition was served on the first respondent by Firdaus Masod, an advocate practicing with the firm of solicitors, known as Messrs Izzaudin, Firdaus and Mahendran. However, in para 3 of the same affidavit he states:

Saya telah diarahkan oleh Tetuan Haida Mohd Fikah & Partners untuk menyampaikan sesalinan Notis Petisyen Pilihan Raya, Petisyen Pilihan Raya dan

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A Resit yang ketiga-ketiganya bertarikh 10 Jun 2013 sebagai serahan kepada Responden Ketiga (selepas ini ditandakan sebagai eksibit 'FM-1').

[9] Rule 15(1) of the EPR provides:

B Notice of the presentation of a petition, accompanied by a copy of the petition, shall, within fifteen days of the presentation of the petition, be served by the petitioner —

(a) On the respondent personally which shall be effected by delivering the notice and a copy of the petition to the respondent;

C

(b) by sending the notice and a copy of the petition by pre-paid registered post addressed to the respondent at his usual or last known place of residence or business; or

(c) by posting a notice on the notice board of the High Court in the State in

D which that constituency or electoral ward is situated and by publishing a notice in a national language newspaper and in any other newspaper circulating within the constituency or electoral ward in which the election was held stating that such petition has been presented and that a copy of the notice of presentation of the petition and a copy of the petition may be

E obtained by the respondent free of charge on application at the office of the Registrar.

[10] Rule 15(1) of the EPR clearly provides that the notice of presentation of a petition accompanied with a copy of the petition must be served by none

F other than the petitioner. However, if the petitioner has appointed an advocate pursuant to r 9 of the EPR then the notice of presentation together with a copy of the petition can be duly served on the respondent by the advocate so appointed. In the petition before this court the service of the said notice as well as the copy of the petition was performed by the advocate not on the

G instruction of the petitioner, himself but on the instruction of another firm of solicitors, Messrs Haida, Mohd Fikah & Partners. This is therefore a non compliance of r 15(1) of the EPR as the law is clear and precise that service of such notice must be by the petitioner. There must be proper service of the petition and if the mandatory requirements as provided under r 15 of the EPR

H is disregarded by the petitioner then the jurisdiction of the Election Court is not invoked.

[11] Therefore premised on this ground alone the election petition is

I obviously flawed and should be struck out and dismissed as against the first respondent. However, I would also like to proceed on the other preliminary objections argued before me.

The petitioner has failed to comply with the mandatory provisions of r 4(1)(b) and

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4(4) of the EPR requiring the petition to state the facts and grounds to sustain the prayers sought.

[12] Rule 4(1) of the EPR provides as follows:

(1) An election petition shall contain the following statements;

(a) it shall state the right of the petitioner to petition within section 34 of the Act; and

(b) it shall state the holding and result of the election, and shall briefly state the facts and grounds relied on to sustain the prayer.

[13] Rule 4(4) provides that the following form, or one to the like effect, shall be sufficient:

IN THE HIGH COURT OF ...

THE ELECTION OFFENCES ACT 1954

Election for ... (state the constituency or electoral ward) holden on the ... day of ... 20 ... The petition of A., of ... (or of A., of ... and B., of ..., as the case may be) whose names are subscribed. (1) Your petitioner A. is a person who voted (or had a right to vote, as the case may be) at the above election (or claims to have had a right to be returned at the above election or was a candidate at the above election), and your petitioner B. (here state in like manner the right of each petitioner);

(2) And your petitioners state that the election was held on the ... day of ... 20 ... when A.B., C.D., and E.F. were candidates, and the Returning Officer has returned A.B. as being duly elected.

(3) And your petitioners say that (here state the concise facts and grounds on which the petitioners rely). Where for your petitioners pray that it might be determined that the said A.B. was not duly elected or returned, and that the election was void (or that the said E.F. was duly elected and ought to have been returned) ....

[14] In the petition the petitioner states as follows:

Pempetisyen kamu menyatakan bahawa dalam menjalankan pilihan raya tersebut, Ketua-ketua Tempat Mengundi Responden Ketiga di beberapa saluran mengundi di dalam Bahagian Pilihan Raya N 49 Nusa Jaya dalam memperakui jumlah undian yang diperolehi oleh setiap calon, telah membuat penyata dalam Borang 14, Dalam Jadual Pertama seperti yang dikehendaki di bawah Peraturan 25(12)(b) Peraturan-peraturan Pilihan Raya (Perjalanan Pilihan Raya) 1981, yang mereka ada sebab yang munasabah untuk mempercayainya sebagai palsu.

Ketidakpatuhan tersebut telah bercanggah dengan Seksyen 4(a) Akta Kesalahan Pilihan Raya 1954 dan ketidakpatuhan tersebut itu telah menyentuh keputusan pilihan raya tersebut sepertimana yang dinyatakan di dalam Seksyen 32(b) Akta Kesalahan Pilihanraya 1954.

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BUTIRAN FAKTA

(i) Pada 5Mei 2013, Ketua Tempat Mengundi Responden Kedua di Tempat Mengundi (Saluran) 2, Pusat Mengundi Sekolah Kebangsaan Taman Universiti (1), Kod Daerah Mengundi 162/49/19 Bahagian Pilihan Raya N 49 Nusa Jaya, dalam memperakui sesalinan Penyata Pengundian Selepas Pengiraan Undi (Borang 14) di pusat mengundi telah membuat penyata bahawa terdapat sebanyak 481 jumlah undian oleh pemilih dan 8 jumlah kertas undi yang ditolak dan 11 kertas undi yang dikeluarkan kepada pengundi tetapi tidak dimasukkan ke dalam peti undi.

Ketua Tempat Mengundi Responden Kedua tersebut bagaimanapun hanya merekodkan hanya 549 sahaja jumlah kertas undi yang diambilkira atau yang patut berada di dalam peti undi di saluran 2 tersebut.

Berdasarkan hal tersebut Borang 14 tersebut adalah satu penyata palsu dan penyata palsu tersebut telah menyebabkan wujud keraguan yang munasabah terhadap keseluruhan 549 kertas undi di saluran tersebut.

(vi) Penyata-penyata palsu yang dinyatakan di perenggan (i) hingga (v) di atas telah mewujudkan keraguan yang munasabah terhadap 2,737 undi (549 + 471 + 520 + 606 + 591) dalam pilihan raya tersebut dan telah menyentuh keputusan pilihan raya tersebut.

[15] It is the submission of learned counsel for the petitioner that this is in contravention of s 4 of the EOA and as a result affected the results of the election as provided under s 32(b) of the same Act.

[16] Section 4 of the EOA is the provision for offences by election officers and reads as follows:

> Any officer, clerk, interpreter or other person having any duty to perform pursuant to any written law relating to any election who —
>
> (a) makes, in any record, return or other document which he is required to keep or make under such written law, any entry which he knows or has reasonable cause to believe to be false, or does not believe to be true;
>
> (b) permits any person whom he knows or has reasonable cause to believe not to be a blind person or an incapacitated person to vote in the manner provided for blind persons or incapacitated persons;
>
> (c) refuses to permit any person whom he knows or has reasonable cause to believe to be a blind person or an incapacitated person to vote in the manner provided for blind persons or incapacitated persons;
>
> (d) wilfully prevents any person from voting at the polling station at which he knows or has reasonable cause to believe such person is entitled to vote;

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(e) wilfully rejects or refuses to count any ballot paper which he knows or has reasonable cause to believe is validly cast for any candidate in accordance with the provisions of such written law;

(f) wilfully counts any ballot paper as being cast for any candidate, which he knows or has reasonable cause to believe was not validly cast for such candidate; or

(g) is without reasonable cause guilty of any act or omission in breach of his official duty,

shall be liable, on conviction, to imprisonment for a term not exceeding two years or to a fine not exceeding five thousand ringgit or to both such imprisonment and fine and, subject to any specific provision to the contrary in any written law relating to any election, shall until the expiration of five years from such conviction be incapable of being registered or listed as an elector or of voting at any election or of being elected at any election, and if at that date he has been elected at any election, his seat shall be vacated from the date of such conviction.

[17] A prosecution of offence under this s 4 can only be instituted with the sanction the public prosecutor (re s 6 of the EOA). Section 32 of the EOA however deals with the grounds for the avoidance of election on election petition:

The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:

(a) that general bribery, general treating or general intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;

(b) that general bribery, general treating or general intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;

(c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;

(d) that the candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement been convicted or found guilty of a corrupt practice by a Sessions Court, or by the report of an Election Judge; or

(e) that the candidate was at the time of his election a person disqualified for election.

[18] Section 32(b) of the EOA must be strictly adhered to. It is incumbent on the petitioner to plead in his election petition that there was non-compliance with the provisions of any written law relating to the conduct

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of any election and such non-compliance affected the result of the election (*Tan Sri Joseph Kurup v Danny Anthony Andipai & Anor* [2009] 3 MLJ 1; [2009] 3 CLJ 523). The petitioner must not only narrate the facts complained of but must also relate on associate the complaints with the provisions of the election laws transgression.

[19] The written law as envisaged under s 32(b) of the EOA are laws relating to the conduct of elections. The specific laws in relation to the conduct of election is the Elections (Conduct of Elections) Regulations 1981 and the Elections (Postal Voting) Regulations 2003. Section 4 is not the written law referred to under s 32(b) of the EOA and therefore do not fall within the ambit of that section. Therefore the arguments of learned counsel for the petitioner that an election can be avoided based on an offence under s 4(a) of the EOA is untenable and cannot be sustain in law.

[20] Justice Alauddin Mohd Sheriff FCJ (as he then was), in delivering the judgment of the Federal Court case of *Dato' Ismail bin Kamus v Pegawai Pengurus Pilihan Raya, Zainal Abidin Azim & Ors* [2005] 3 MLJ 193; [2005] 2 CLJ 237, opined on s 32(b) of the Act at p 199 (MLJ); p 245 (CLJ) as follows:

> The provision clearly places the burden on the appellant to prove to the satisfaction of the election judge that:
>
> (i) there has been non-compliance with the provision of the written law relating to the conduct of the elections; and
>
> (ii) the said non-compliance has affected the result of the elections.
>
> There is no doubt in our minds that the two (2) limbs in s 32(b) are to be read conjunctively and not disjunctively.

[21] Justice Wan Yahya in *Bong Geok Beng v Ahmad Nordin bin Mohamed Amin & Anor; Rosnah bt Kamarudin v Samad bin Kassim & Anor; Lai Keun Ban v Tan Sri Chong Hon Nyen & Anor; Mohamed bin Bakar v Abdul Rashid bin Othman & Anor* [1980] 1 MLJ 167; [1978] 1 LNS 18 held that:

> Section 32 of the Election Offences Act 1954, requires the petitioner not only to state specifically in his petition which provisions of the law on which non-compliance is alleged to have taken place but also to supply adequate information as to how the respondent is said to have offended that law. In these cases the petitions were defective for want of specific charges.

[22] The Federal Court in the case of *Mahari bin Endut v Dato' Hj Mat Razali Kassim & Ors* [2009] 5 MLJ 153; [2009] 4 CLJ 488; [2009] 1 LNS 449) held that:

> In election cases the principles on pleadings are well settled. Strict compliance with the provisions of the Act 5, regulations and/or Rules is required otherwise any

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election petition would be rendered defective and liable to be struck out in limine. Thus, under r 4(1)(b) of the Election Petition Rules 1954 ('the petition Rules 1954') it is mandatory that an election petition shall state briefly the facts and grounds relied upon to sustain the prayers sought for. The rationale for this strict requirement is that the the right conferred by that Act is a special kind of right unknown to the common law or equity, and the court which administers it possesses a special kind of jurisdiction (see *Theberge v Laudry* [1876] 2 App Cas 102, *Goonesinha v Hon CI de Kretser* [1945] AC 63 or what is said in *Arzu v Arthur* [1965] WLR 675 as a peculiar jurisdiction).

[23] Raja Azlan Shah J (as His Royal Highness then was) in *Tengku Korish v Muhamad bin Jusoh; Abdul Raouf v Ibrahim bin Arshad & Anor; Mokhtar bin Abdullah v Mokhtar bin Haji Daud & Anor* [1970] 1 MLJ 6; [1969] 1 LNS 189 in his judgment said:

The Election Offences Act 1954 confers certain rights and provides a remedy for enforcing those rights. Where that is the case, the remedy provided by that statute only must be availed of Wills J stated this rule with great clarity in *Wolverhampton New Waterworks Co v Hawkesford* 6 CB (NS) 336; 141 ER 486, 495 in the following passage:

> There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it ... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

[24] It is the contention of the petitioner that there were some act of falsifying but however the petition did not particularised what items or facts that was falsified. The facts pleaded in the petition must be sufficient to establish the necessary nexus between the facts and the grounds to avoid the election. This nexus is paramount as it forms the heart of any petition that hopes to see the light of day (*Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729). A petitioner must therefore plead in the petition itself such material facts with such particulars where necessary to show on the face of the petition that he has a cause to complain under one of the five provisions of s 32 of the EOA on the merit before it can be examined on the merit at a full hearing.

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[25] Rule 5 of the EPR provides that:

> Evidence not to be stated in petition but particulars may be ordered. Evidence need not be stated in the petition, but the Judge may, upon application in writing by a respondent, order such particulars as may be necessary to prevent surprise and unnecessary expense and to ensure a fair and effectual trial upon such terms as to costs and otherwise as may be ordered.

[26] The next inevitable question that comes to mind is 'what is material facts'? In *Patau Rubis v Patrick Uren & Anor* [1984] 1 CLJ 51; [1984] 2 CLJ (Rep) 348, Charles Ho elucidated the meaning of 'material facts' in an election petition and Ray J's dicta in *Hardwari Lal v Kanwal Singh* AIR 1972 SC 515 at p 520:

> Material facts are facts which if established would give the petitioner the relief asked for. If the respondent had not appeared could the court have given a verdict in favour of the election petitioner. The answer is in the negative because the allegations in the petition did not disclose any cause of action.

[27] His Lordship then concluded:

> The courts in India also explained in other cases the words 'material facts' to mean what is necessary for the purpose of formulating a complete cause of action and the failure to plead which would render the pleading to be struck out under the rules of pleadings. (See *Keshav Prasad v A.D. Mani* [1961] DEC 133 (MPHC); *H V Kamath v Election Tribunal* AIR 1958 MP 168).

[28] The Federal Court in *Mohd Nazri bin Hj Din v Dato' Seri Raja Ahmad bin Zainuddin Raja Haji Omar & Ors* [2009] 3 MLJ 589; [2009] 1 LNS 129 said:

> The use of the word 'shall' in the rules means that the requirements of the two rules are mandatory. The extent to which the facts and grounds relied upon must be set out in a petition is explained by the use of the words 'briefly' in Rule 4(1)(b) and 'concise' in Rule 4(4)(3). The word 'briefly' is the adverb of 'brief' which is defined in *Webster's New World Dictionary* as, inter alia:
>
> > 'a concise statement of the main points of a law case, usually filed by counsel for the information of the court'
> >
> > And the word 'concise' as 'brief and to the point; short and clear. Concise implies the stating of much in few words, by removing all superfluous or expanded details'.

[29] I am of the view that the petitioner failed to state the material facts and grounds with regards to complaints to sustain the prayers sought. The Federal Court in *Wan Sagar bin Wan Embong v Harun bin Taib* [2008] 6 MLJ 473; [2009] 1 CLJ 457 per Zulkefli bin Ahmad Makinuddin FCJ at p 484 (MLJ);

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p 470 (CLJ) which reads:

> On the issue of whether the facts and grounds necessary to sustain the petition have properly and adequately been pleaded by the appellant, we are of the view that the learned Election Judge had made correct conclusions and in line with a long list of authorities, including the decision of the Federal Court in the case of *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729 which states that under the EPR it is a mandatory requirement that a petition must not only state the facts but also the grounds to sustain the prayer and failure to do so renders the petition defective.

[30] This petitioner failed to state with clarity the facts and grounds relied on to sustain the prayer and must therefore fall. The Federal Court in the case of *Gan Joon Zin* affirmed the decision of the learned High Court judge that r 4(1)(b) of the EPR '... is a mandatory requirement that a petition must state not only the facts but also the grounds relied on to sustain the prayer. Failure to do so would render the petition defective'.

[31] The Federal Court in *Wan Daud bin Wan Jusoh v Mohamed bin Haji Ali & Anor; Daud bin Jusoh v Annuar bin Haji Musa & Anor; Mohd Nor bin Ismail v Mohd Zain bin Abdullah & Anor* [1988] 2 MLJ 384; [1987] 1 LNS 68 held:

> ... a petitioner who is desirous of challenging the election of a successful candidate must first of all be able to show the court that he has a right to be heard under any or all of the five situations enumerated under section 32. The format and essential contents of the petition which he is required to conform with are prescribed under rule 4. Paragraph (b) of sub-rule (1) of that rule enacts in peremptory language that the petition shall state the facts and grounds relied on to sustain the prayer. This requirement is further repeated under paragraph 3 of the specimen form shown in sub-rule (4). A petition under rule 4 therefore must not only narrate the facts complained of but must relate or associate the complaints with the provision of the election laws the respondent is alleged to have transgressed. For instance, if the petitioner's complaint is on the irregularity in counting votes, he must factually account for the incident and then he has to state briefly why the act complained of is irregular? in the instant illustration, probably transgression of regulation 25 of the Elections (Conduct of Elections) Regulations 1981. The consequential issue raised by the respondents is that non-compliance with the rule will lead to the dismissal of the petition ....

[32] The petitioner further states in his petition that:

> (a) Pempetisyen kamu menyatakan bahawa dalam menjalankan pilihan raya tersebut, pegawai-pegawai pilihanraya Responden Kedua telah tanpa sebab yang munasabah melakukan atau peninggalan yang berlanggaran dengan tugas rasmi mereka apabila mereka gagal menghalang seseorang dengan tanpa kuasa yang sewajarnya membawa keluar dari tempat mengundi kertas undi di Bahagian Pilihan Raya N49 DUN Nusa Jaya ke luar tempat mengundi iaitu ke bahagian pilihanraya N29 DUN Mahkota.

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A BUTIRAN FAKTA

(i) Pada lebih kurang 5.30 petang pada 5 Mei 2013 Ajen Mengira Undi calon PAS bagi DUN N 29 Mahkota iaitu Encik Sukri bin Ahmad (No KP 720805-01-5783 (selepas ini dirujuk sebagai Encik Sukri) ketika dalam Awal bagi Pusat Mengundi Dewan Mahkota, Tempat Mengundi (Saluran) 4, Kod Daerah Mengundi 152/29/14 Bahagian Pilihan Raya N 29 Mahkota yang dijalankan di Bilik Mesyuarat Wawasan, Ibu Pejabat Daerah Polis Kluang mendapati wujudnya 4 kertas undi yang tertera nama Salahuddin Ayub iaitu calon PAS bagi DUN N49 Nusa Jaya telah dengan secara tidak sah berada dalam peti undi bagi DUN N29 Mahkota.

(ii) Encik Sukri telah meminta Ketua Tempat mengundi bagi DUN N29 Mahkota tersebut agar membawa perkara yang dinyatakan di dalam perenggan (i) di atas ke pengetahuan Ketua Responden Kedua di Pusat Penjumlahan Undi namun Ketua Tempat Mengundi DUN N29 Mahkota tersebut hanya bertindak menolak 4 kertas undi tersebut tanpa melaporkan perkara tersebut ke pengetahuan Ketua Responden Kedua di Pusat Penjumlahan Undi.

(iii) Encik Sukri telah memaklumkan perkara tersebut agar kepada calon PAS bagi DUN N29 Mahkota iaitu Encik Khairul Faizi bin Ahmad Kamil dan setelah berbincang dengan calon PAS tersebut, Encik Sukri telah pada 9 Mei 2013 membuat laporan polis berkenaan perkara tersebut.

[33] During the counting of the ballot box an agent of the PAS candidate at DUN Mahkota discovered four ballot papers from DUN Nusa Jaya inside the ballot box. He then brought to the attention of the presiding officer who rejected the four ballot papers. Subsequently a police report was made four days after the election. Therefore it is contended that there is reasonable doubt on the total number of advance voting for DUN N49 Nusa Jaya.

[34] Regulation 27B of the ECER provides:

> The ballot box containing the advance ballot papers on the conclusion of the advance voting shall be kept in the safe custody of the returning officer of the constituency in which the election is contested or in accordance with the arrangement approved by the Election Commission until the counting of votes of advance voters on the polling day.

[35] The petition however does not disclose whether the advance ballot box was tampered or state the breach committed by the returning officer and/or presiding officer. Regulation 25 of the ECER sets out the procedure which must be complied with by the said officer during the counting of the votes. Section 41 of the EOA reads:

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> On an election petition the decision of a returning officer or presiding officer, whether or not a ballot paper shall be rejected, under any written law relating to the election, shall not be questioned.

[36] Therefore, the rejection of the four votes was final and could not be questioned. There is no material facts pleaded in the petition to show that that there was a breach of the law relating to the procedure in the counting of votes.

[37] The petition does not disclose sufficient facts to show that there is a breach of the election laws relating to the procedure in the counting of the votes. The petitioner therefore has not complied with the requirement of r 4(1)(b) and 4(4) of the EPR. The petition lacks the particulars which entitle this petition to be struck out.

The petitioner has failed to comply with the mandatory provisions of r 4(1)(b) and 4(4) of the EPR. The facts pleaded are insufficient to sustain the prayer that the alleged non-compliances have affected the result of the election

[38] It is the submission of the learned federal counsel that the facts pleaded by the petitioner even if it is clear and concise would not be capable of affecting the results of the election. The petitioner seems to be disputing the total number of ballot appears accounted in the ballot box but there is no substantial dispute as to the number of votes by elector for each contesting candidate. The facts pleaded are insufficient to sustain the prayer that the alleged non-compliance has affected the result of the election.

[39] A petitioner in an election petition must strictly adhered to and comply with all the requirements of the election laws. Justice Azahar Mohamad in the case of *Mohd Zaid Ibrahim* explained the reason why it is essential for the petition to set out the material facts and give sufficient particulars:

> A basic norm of natural justice is that before initiating adjudicatory proceedings, the party concerned should be given notice of the case against him so as to enable him to adequately defend himself. The right to a hearing becomes illusory if the party has no sufficient and full knowledge of the precise allegations which he has to meet. Notice is thus regarded as the sine qua non of the right of hearing (see A*dministrative Law of Malaysia and Singapore* (3rd Ed) by Professor MP Jain at p 291). ...
>
> It is for these reasons that election court insists upon a strict compliance of the election laws in order for the respondent to know the nature of the allegations so as to enable him to prepare his case. In this way, he might marshal his facts and preserve his evidence in anticipation of a judicial hearing ....

[40] The Federal Court in *Wan Sagar bin Wan Embong v Harun bin Taib* [2008] 6 MLJ 473; [2009] 1 CLJ 457 held:

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A It is now settled law in Malaysia that if a petitioner pleads infringement of s 32(b) of the EOA he must provide facts and grounds to show that a non-compliance with the provisions of any written law relating to the conduct of an election 'affected the result of the election'.

B **[41]** In *Dato' Ismail bin Kamus v Pegawai Pengurus Pilihan Raya, Zainal Abidin Azim & Ors* [2005] 3 MLJ 193; [2005] 2 CLJ 237 it was held by the Federal Court:

C The two (2) limbs in s 32(b) of the EOA are to be read conjunctively and not disjunctively. Section 32(b) of the EOA is very clear. The onus is on a petitioner to prove to the satisfaction of the election judge that there was non-compliance with the provisions of any written law relating to an election and that such non-compliance affected the result of the election. The English approach as illustrated in the case of *Morgan v Simpson* [1974] 3 All ER 722 should not be applied in Malaysia as s 32(b) of the EOA — on which the appellant's petition was D based — is crystal clear in its language. To accept the English approach (interpretation) would defeat Parliament's intention in enacting s 32(b) (pp 245 d, 247a & 250b).

E **[42]** In the present case as far as the pleadings is based on s 32(b) of the EOA. The petitioner is therefore required to plead in the petition such material facts with such particulars where necessary to show on the face of the petition that he had cause to complain under one of the five provisions of s 32 of the EOA before his case can be examined on the merits at a full hearing. A petition must F not only narrate the facts complained of but must also relate or associate the complaints with the provision of election laws alleged to have been transgressed. In determining the results of an election the material figures would be the number of votes for each candidate. The petitioner based to plead or narrate sufficient facts so as to make out a case against the respondents G pursuant to s 32(b) of the EOA.

[43] It is the submission of the petitioner that there were breaches or non-compliance committed by the respondents and the breaches have cumulatively resulted in no election pursuant to s 2(1) of the EOA. I am in H agreement with the submission of the first and second respondents that s 2(1) of the EOA is not a relief under the law. Section 2 of EOA is an interpretation section to define words referred in the said Act.

I **[44]** Therefore there is nothing in the petition to show the facts complain of or the election laws alleged to have been transgressed. The failure on the part of the petitioner to do so render the petition defective. I am of the view that the facts pleaded are insufficient to sustain the prayer that the alleged non-compliance has affected the result of the election.

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CONCLUSION

[45] In conclusion the petitioner has failed to comply with the requirements of the EPR as the facts and the grounds pleaded do not support the relief sought. Based on all the above mentioned reasons, I see no alternative but to find that the preliminary objections raised by the first, second and third respondent's relating to r 4(1)(b) and 4(4) of the EPR read together with s 32(b) of the EOA are sufficient to strike out the petition with costs. After hearing the submission on cost by all parties it is hereby ordered cost of RM25,000 for each respondent.

[46] In accordance with s 36(1) of the EOA I declare that the third respondent was duly elected as the Member of the State Legislative Assembly for Nusa Jaya State Constituency of N49.

Petition struck out with costs of RM25,000 for each respondent.

Reported by Kanesh Sundrum